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No. 45

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The oral opinion of the United States District Court for the District of Massachusetts (R. 33-34) is not reported. The opinion of the United States Court of Appeals for the First Circuit (R. 39-47) is reported at 236 F. 2d 101.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1956 (R. 47). By order of Mr. Justice Frankfurter, dated November 5, 1956, the time for filing a petition for a writ of certiorari was extended

to November 15, 1956. (R. 48). The petition was filed on November 13, 1956, and was granted on January 14, 1957 (R. 48). 352 U.S. 965. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States, in shipping naval property by rail in 1944, ordered freight cars of a certain size. Cars larger than those ordered were furnished and proportionately higher charges were imposed. Pursuant to Section 322 of the Transportation Act of 1940, the Government promptly paid the bills presented. On post-audit, the Government questioned the higher charges—which, concededly, can only be justified if no cars of the type ordered were in fact available to the carrier—and it offset the difference (in conformity with Section 322) against a later transportation bill submitted by the carrier for other services. The carrier thereupon brought suit on the later transportation bill, claiming that it was entitled to the full amount of that bill undiminished by the Government's deduction. The following questions are presented:

1. Whether, as the Government contends, the carrier had the burden of proving that its charges for the original services were correct or whether, as the courts below held, Section 322 shifts to the United States the burden of proving that they were excessive.

2. Whether, even assuming that under Section 322 the Government has the burden of establishing the incorrectness of a carrier's charges, such burden extends to facts (such as unavailability of cars of the type ordered) peculiarly within the knowledge of carriers or accessible to them.

STATUTE INVOLVED

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66, provides as follows:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office; but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

STATEMENT

This action was brought against the United States by respondent New York, New Haven and Hartford Railroad Company under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346(a)(2), to recover sums allegedly due it for transporting Government property (R. 3). The pertinent facts are undisputed and may be summarized as follows:

During September and October, 1944, the Government shipped several carloads of naval supplies to Massachusetts and Rhode Island (R. 7, 8, 9, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27). Each shipment was made under a Government bill of lading which called for an open freight car of specified length (R. 21, 22, 23-24, 25, 26). The following month, respondent, the terminal carrier, presented bills to the Government for these transportation services (R. 8,

11, 13, 15-16, 18, 21, 23, 24, 25, 27).[1] Pursuant to Section 322 of the Transportation Act of 1940, *supra*, p. 3, the bills were paid promptly upon presentation, without prior audit by the General Accounting Office (R. 8, 11, 13, 16, 18, 21, 23, 24, 25, 27).

Thereafter, the bills were post-audited by the General Accounting Office (R. 21, 23, 24, 26, 27). The audit revealed (1) that, in each instance, the initial carrier had furnished a freight car larger than that ordered by the Government in the bill of lading, and (2) that the charges in the bills had been computed upon the basis of the minimum weight fixed for cars of the size *furnished*, rather than the minimum weight fixed for cars of the size *ordered* (R. 21, 23, 24, 26, 27). In view of the complete absence of any showing that the initial carriers were not able to furnish cars of the size ordered, and in view of the further fact that "[s]uch information is peculiarly within the knowledge of plaintiff [respondent] and/or the initial carrier," the General Accounting Office, in 1950, claimed a refund for the difference between the charges for the cars ordered and those furnished (R. 21, 22-23, 24, 25-26, 27). Respondent was promptly so advised on standard G.A.O. Form No. 1003 (R. 21-22, 23, 24, 26, 27). This form states that, unless the overpayment is refunded within sixty days, it will be deducted pursuant to Section 322 from any other amount "subsequently found to be due such carrier" (*supra*, p. 3).

Respondent ignored the refund demands. Deduction was accordingly made from a bill submitted by respondent in June 1951 (for certain 1950 transporta-

[1] The terminal carrier, as provided in the Standard Government Bill of Lading used in the shipments in question, acts as agent for all participating carriers in collecting shipping charges.

tion), and paid (after deduction) the following month (R. 22, 23, 25, 26, 27-28).

Respondent filed this action in the District Court on May 14, 1953, alleging (1) the performance of the later (1950) transportation service; (2) the billing of the Government for that service in the amount of $1,143.03, representing the lawful charges under applicable tariffs; and (3) the Government's refusal to pay the bill as rendered (R. 3). The complaint alleged no facts relating to the 1944 shipments upon which the Government predicated its deduction. The relief sought was the recovery of the entire amount of the bill for the 1950 transportation (R. 3).

In a substitute answer, the Government admitted the performance of the 1950 transportation service and the correctness of respondent's charges for that service (R. 4-5). It asserted, however, that respondent had been paid in full, $117.77 having been paid to it by check and the balance having been credited against the overpayments on the 1944 bills (R. 5). The answer explained the basis of the determination of overpayment and alleged that respondent at no time furnished the Government with facts respecting its failure to furnish cars of the size ordered (R. 5).

Respondent filed a response described as "Plaintiff's Answer to Defendant's Counterclaim" (R. 5-6). This response admitted receipt of the $117.77 check but denied that the Government was overcharged on the 1944 shipments. The issue was thus narrowed to the correctness of the original charges demanded by the carrier and paid by the Government in 1944.

Thereafter, the District Court ruled that the burden of establishing the essential facts relating to the 1944 transportation service, *i.e.*, that the carriers could not

have furnished cars of the type that the Government ordered, rested on the United States (R. 33-34). On the basis of this ruling, the court, on November 23, 1955, entered summary judgment for respondent in the amount of $402.84 (R. 37-38).[2]

The Court of Appeals affirmed. The opinion points out that, prior to the enactment of Section 322 in 1940, the Government did not pay transportation bills until it determined, on the basis of a detailed *pre*-audit by the General Accounting Office, that the charges were correct (R. 43). Under that practice, if the charges were found to be excessive and a lesser amount was paid by the Government, the carrier, if it brought suit for the difference, "of course * * * would have the burden" of proving the underpayment (R. 43). The opinion also observes that Section 322 was enacted as "remedial legislation passed at the behest of the carriers, who had complained of the inordinate delays of the pre-audit procedure theretofore prevailing which resulted in tying up large amounts of accounts receivable" (R. 44). The court concluded, however, that prompt, unaudited payment by the Government, pursuant to Section 322, permanently frees the carrier of the burden of justifying its charges and that an administrative offset, made after audit and effectuated in conformity with the statute, is insufficient to put the carrier to its proof (R. 47).

SUMMARY OF ARGUMENT

Section 322 of the Transportation Act of 1940 provides that the Government shall make payment of bills for transportation services on presentation, "prior to

[2] This figure was reached following an agreement between the parties allowing the Government a credit of $622.42 (R. 35).

audit or settlement by the General Accounting Office". It further provides, however, that "the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier". The Court of Appeals has held that the exercise of this explicitly reserved right does not put the carrier to its proof, in subsequent judicial proceedings arising out of the deduction, that the original charges were correct. The court has further held that this is so even where, as here, the correctness or incorrectness of those charges is wholly dependent upon factual information peculiarly within the carrier's possession. It is our position that both of these holdings are erroneous.

I

A. Traditionally, contractual claims against the Government have been paid only after an administrative audit has demonstrated their correctness. Where the evidence furnished to the accounting officials in support of the claim leaves the matter of validity in doubt, the claim is disallowed. If dissatisfied with the disallowance, the claimant's recourse is a suit under the Tucker Act, in which it has the burden of alleging and proving facts which will establish clear liability on the part of the United States for the amount purportedly due it. Prior to 1940, these settled procedures were applicable to common carriers, as well as to all other claimants (who are still subject to them). Thus, had the present dispute involved charges for transportation services performed in 1939, rather than 1944, respondent would have had to establish its entitlement to the full amount of those charges.

B. The background and legislative history of Section 322 show that the Section was passed at the instance of common carriers to give them the benefit of prompt payment. There was not the slightest intimation that the Government's rights would be altered by the use of a post-audit, rather than a pre-audit, procedure. It appears, on the contrary, that all concerned were of the view that the Government's position would be fully preserved in every respect by the reservation of the right to deduct from subsequent bills any overpayment revealed by post-audit. The only inference which the background and history admit is that the carriers were to receive the benefit of immediate payments, but that the Government was to retain unimpaired the right to put the carriers to their proof whenever a post-audit revealed to the Comptroller General that there was a basis for doing so. Indeed, the carriers themselves, in seeking the change to a post-audit procedure, stated that, should the audit reveal an overpayment, the carrier would make a prompt refund; reserving the right to bring suit to recover the refunded amount if it felt that the conclusion reached on the audit was erroneous. Moreover, the conditional nature of a pre-audit payment made under Section 322 was expressly recognized by this Court in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59.

C. In holding that respondent was under no obligation to prove the correctness of its original (1944) charges, the court below relied on the fact that the suit was brought on the later, and concededly correct, bill against which the Government made its offsetting deduction. As the Court of Appeals viewed the matter, by refusing to refund the overpayments as administra-

tively determined[3] and by requiring the Government to make a deduction from a subsequent bill, respondent relieved itself of the duty to justify its disputed 1944 charges and shifted to the Government the burden of establishing, by way of a counterclaim, that those charges were incorrect.

It is true that the carrier's complaint in terms states a claim on the subsequent bill and that it does not undertake to disclose the real controversy which prompted the Government, acting under Section 322, to make a deduction before paying that later bill. But the pleadings as a whole indisputably establish that the only issue between the parties is whether the original 1944 charges were correct. We submit that the statutory scheme is designed to maintain for the federal treasury its traditional protection and that the burden remains on the party claiming against the United States to establish, as against the Comptroller General's contrary determination, the correctness of its charges. This purpose is not to be defeated by an artfully elliptical complaint.

This Court has regularly looked through form to substance in considering suits following upon an administrative deduction from an undisputed claim. It has held that such an action is not to be regarded as one involving the undisputed claim, but is to be deemed, both for jurisdictional and other purposes, as presenting solely the question of the propriety of the deduction. See, *e.g.*, *Reynolds* v. *United States*, 292 U.S. 443, and *Alcoa Steamship Co.* v. *United States*, 338 U.S. 421.

This Court has also recognized that, even in the absence of the special considerations present when the

[3] Carriers have ordinarily refunded prior to instituting suit.

procedures of Section 322 are involved, the long-standing right of the United States to require a full showing by the claimant is not defeated by the fact that the latter had, in the first instance, received full payment on its claim. *Grand Trunk Western Ry. Co.* v. *United States*, 252 U.S. 112. And, at least until this litigation, the lower courts, almost without exception, had likewise placed the burden on the claimant to prove that the deduction was improper or, otherwise stated, that the claim actually in issue was correct.

II

Even if the Government, contrary to the views expressed above, had an initial burden, its burden must be deemed satisfied by a showing that the furnished cars were of a type other than that which was ordered.

A. As the court below determined, and as respondent tacitly concedes, the transportation charges computed on the basis of the unordered and unnecessary cars were proper only if equipment of the type ordered was unavailable.

B. On this record, respondent, rather than the United States, must be assumed to know, or have access to, the pertinent information on the question of the availability of cars of the type ordered. While, as the Court of Appeals noted, respondent was the terminal carrier, in collecting the charges it acted as agent for the initial carrier and is therefore responsible for the production of material records in the latter's possession. Consequently, the holding below conflicts with the consistent rulings of this Court that the burden may not be placed upon a litigant of establishing facts peculiarly within the knowledge of an adverse party. See, *e.g.*, *Selma, Rome etc. Railroad* v. *United States*, 139

U.S. 560, 566; *United States* v. *Denver and R. G. R. Co.*, 191 U.S. 84.

ARGUMENT

The decision below interprets Section 322 of the Transportation Act of 1940 as effecting a fundamental and drastic change in the rights of the United States, as shipper, *vis-a-vis* common carriers. As interpreted, the Section does not merely give a carrier the advantage (which Congress plainly intended to confer) of prompt payment, *i.e.*, freedom from the delays which are the necessary incident of a Government pre-audit; it accomplishes the further result that, if the post-audit contemplated by the Section reveals the probability that an overpayment has been made, the carrier can no longer be put to its proof that its original charges were correct.

It is our basic position, developed in Point I below, that the latter result, with its adverse effect upon the protection of the public treasury against improper claims in connection with transportation services, sharply departs from the legislative purpose and disregards the consistent holdings of this Court as to the conditional character of pre-audit payments. We argue further, in Point II, that even assuming that Section 322 imposes a new burden on the Government—the duty, in ordinary circumstances, of disproving the correctness of the carrier's charges—the ruling below cannot be justified. For, in conflict with settled principles, it requires the Government to assume the burden of proof on an issue (availability of cars of the type ordered) as to which the adverse party, and not the Government, is chargeable with knowledge.

I

Respondent Had the Burden of Proving That Its Charges for the 1944 Transportation Services Were Correct

A. *Traditionally, Claimants Against the Government Have Been Required to Establish the Validity of Their Claims.*

It has long been an established procedure in the settlement of Government accounts to subject to administrative scrutiny—prior to payment—bills submitted for the rendition of services pursuant to contract with the United States. See 33 Op. Atty. Gen. 383; *Longwill v. United States*, 17 C. Cls. 288, 290; *Charles v. United States*, 19 C. Cls. 316, 319; *Ravesies v. United States*, 21 C. Cls. 243; *Oregon-Washington R. & N. Co. v. United States*, 54 C. Cls. 131, 138-139; *Southern Pacific Co. v. United States*, 60 C. Cls. 662, affirmed, 272 U.S. 445. Generally, this scrutiny takes the form of examination of the bill by an accounting officer to ascertain its correctness. Only if the responsible officer certifies the bill for payment is actual disbursement of Government funds made. 33 Op. Atty. Gen. 383; Section 1 of the Act of December 29, 1941, 55 Stat. 875, 31 U.S.C. 82(b).[4]

[4] 31 U.S.C. 82(b) provides that disbursing officers shall disburse monies only upon, and in strict accordance with, vouchers duly certified by the department head or by an officer authorized in writing to certify vouchers. For some of the other statutory provisions upon which the pre-payment examination of claims is based, see R.S. 3620, 31 U.S.C. 492 (duty of disbursing officer to draw monies only as it may be required for payments to be made by him "in pursuance of law"); R.S. 3622, 31 U.S.C. 496 (disbursing officer to render monthly accounts); R.S. 3623, 31 U.S.C. 498 (distinct accounts required); R.S. 3633, 31 U.S.C. 514 (civil liability of disbursing officer upon his failure to account); R.S. 3648, 31 U.S.C. 529 (prohibition against advances of public monies);

As judicially recognized at an early date and as declared in formal rulings by the Comptroller General, it is incumbent upon the claimant to furnish evidence satisfactorily establishing its claim. *Charles* v. *United States*, *supra*; 17 Comp. Gen. 865, 870; 17 Comp. Gen. 831, 834; 18 Comp. Gen. 980; 23 Comp. Gen. 907, 909. When the evidence furnished leaves the accounting officer in doubt as to the validity of the claim—and such doubt is shared by the General Accounting Office on its review—the claim is not paid and the claimant's sole recourse is a suit under the Tucker Act.[5] In such a judicial proceeding, the claimant, of

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Section 1 of the Act of August 23, 1912, 37 Stat. 375, as amended, 31 U.S.C. 82 (examination of all vouchers by administrative heads of divisions and bureaus); Section 2 of the Act of December 29, 1941, 55 Stat. 875, 31 U.S.C. 82(c) (accountability of certifying officers for illegal, improper, or incorrect payments resulting from false, inaccurate or misleading certificates made by him, as well as for any payment prohibited by law or which did not represent a legal obligation under the appropriation or fund involved).

For a detailed discussion of Government fiscal management, see Mansfield, *The Comptroller General* (1939), especially chapters V and VII.

[5] As the Court of Claims stated in the *Charles* case [19 C. Cls. at 319]:

> "When, in the course of the examination of accounts in the Departments, suspicions are aroused or doubts are entertained as to the validity of the demands of claimants, the parties may be sent to this court to prove their cases under the rules and forms of law, upon legal and competent evidence, or their demands may be rejected altogether, leaving the claimants to prosecute them here upon their own voluntary petitions, if they so desire. That is the main protection which the accounting officers can secure for themselves and for the government in the case of claims of doubtful validity in fact or in law, and especially of claims as to which there is a reasonable suspicion of fraud, irregularity, or error."

Since 1926, the executive departments have been under instructions from the Comptroller General to transmit—without payment—doubtful accounts and claims to the General Accounting Office.

course, has the same burden as it had at the administrative level:—it must allege and prove facts establishing clear liability on the part of the United States for the amount assertedly due it. *Southern Pacific Co.* v. *United States*, *supra*, 60 C. Cls. at 671; *Charles* v. *United States*, *supra*, 19 C. Cls. at 319.

Prior to the enactment of the Transportation Act of 1940, these procedures were as fully applicable to common carriers as to other claimants. The carrier was paid only that amount which was shown by the pre-audit to be justified. If dissatisfied with the administrative determination, the claimant was obliged to establish that it was entitled to more "by proof as full and satisfactory as that required for the establishment of any other contract to hold the Government liable." *Southern Pacific Co.* v. *United States*, *supra*. See also 33 Op. Atty. Gen. 383; *Oregon-Washington R. & N. Co.* v. *United States*, *supra*.[6]

Section 1 of G.A.O. General Regulations No. 50, April 21, 1926, 4 C.F.R. 4.1. This regulation was promulgated under the authority given the Comptroller General by Congress to prescribe the procedure for the administrative examination of claims against the United States, and to promulgate rules and regulations necessary in this connection. See Sections 309 and 311(f) of the Budget and Accounting Act, 1921, 42 Stat. 20, 25, 31 U.S.C. 49, 52(f).

[6] As the opinion of the Attorney General cited in the text reveals, on November 25, 1922, the Comptroller General promulgated General Regulations No. 13, 2 Comp. Gen. 832, in which he called for a radical revision of the existing system of paying and auditing disbursing accounts. Instead of payment by disbursing officers following a certification of validity by the accounting officer, departmental action would be limited to a certification that the services had been performed, that they were properly authorized and necessary, and that the amount claimed had not been paid but is payable from a particular, designated appropriation. The bill would then be transmitted to the General Accounting Office for audit and, upon approval, actual payment.

The Attorney General, in his opinion, determined the regulation

B. *Section 322 of the Transportation Act of 1940 Was Not Intended to Shift the Burden of Proof in Cases Involving Carrier Claims Against the United States From the Carrier to the Government.*

1. *The background of Section 322.* During the latter part of the 1930's, problems confronting the transportation industry were a matter of national concern. Many of the railroads, it appeared, were in critical financial condition. See H. Doc. No. 583, 75th Cong., 3rd Sess., pp. 1-2; S. Rept. 433, 76th Cong., 1st Sess., pp. 1-2; Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 2531, January 24, 1939, p. 17. Consequently, on March 15 and 17, 1938, a conference was held at the White House to consider the railroads' difficulties and to determine what action might be taken by the Federal Government to improve existing conditions. At this conference, which was attended by representatives of various interested groups, President Roosevelt designated the Chairman and two Commissioners of the Interstate Commerce Commission as a committee of three to recommend remedial legislation. On March 24, 1938 this committee rendered its report to the President. On April 11, 1938, the President transmitted it to the Congress. H. Doc. No. 583, 75th Cong., 3rd Sess.

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to be invalid. And, in commenting on this fact in a letter to the Chairman of the Senate Committee on Interstate Commerce on April 28, 1939, Attorney General Murphy advised that most of the departments and agencies of the Government still audited their respective transportation accounts. This letter was submitted in connection with S. 1915, 76 Cong., 1st Sess., which, as will be seen below, contained a provision similar to Section 322 of the Transportation Act of 1940. It is included in the Committee's files on that bill. And see, also, *Annual Report of the Acting Comptroller General for the fiscal year ending June 30, 1937*, p. 44.

The single recommendation of the committee of three which pertained specifically to transportation services performed for the Government was a proposal for the elimination of the then prevailing land-grant rates, which the committee felt worked an unjustifiable hardship on the land-grant railroads (many of which were experiencing acute financial distress). H. Doc. No. 583, 75th Cong., 3rd Sess., p. 32.

Another source of dissatisfaction in the railroad industry (though it was not treated in the above report) was the governmental practice of not paying rendered transportation bills upon presentation, as is required of private shippers. Section 3(2) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 3(2).[8] This dissatisfaction manifested itself in several forms. For one thing, critical comments were appearing in industry publications. One of the most extreme examples was an editorial in *The Traffic World*, a leading transportation journal. Referring to the delays incident to the payment of freight bills because of the prepayment audit precedure, the editorial accused the Government of disregarding both sound business practices and "common honesty." It added:

> We should say that the very least that could be done by an administration that proclaims from the housetops its condemnation of bad business practices and pretends especially to be interested in the welfare of the railroads, would be to pay them what it owes them with some degree of promptness.

[7] See 10 U.S.C. 1375; *United States* v. *Union Pacific R. Co.*, 249 U.S. 354, 355; *Southern Ry. Co.* v. *United States*, 322 U.S. 72, 73; *United States* v. *Powell*, 330 U.S. 238, 241.

[8] By its terms, Section 3(2) is inapplicable to transportation services furnished to governmental units.

> Nobody likes to have business dealings with the Government, not only because of delay and annoyance incident to the ridiculous amount of red tape involved, but because it is actually dishonest.[9]

On October 5, 1937, J. J. Pelley, President of the Association of American Railroads,[10] raised the issue with the Procurement Division of the Department of the Treasury. In Mr. Pelley's letter, the full text of which is set forth in Appendix B to this brief (pp. 59-63, *infra*), the Association elaborated upon the delays encountered by the railroads in obtaining payment for transportation services rendered the Government and outlined the reasons why these delays were of particular concern. It then stated (pp. 61-62, *infra*):

> We believe that the delay in the payment of transportation charges by the Government to the railroads would be absolutely avoided if the various departments contracting for transportation were instructed to pay the bills as rendered and after payment have these bills referred to the General Accounting Office or such other governmental

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[9] *The Traffic World*, June 11, 1938, p. 1343. See, also, for further evidence of the industry's continuing concern regarding prepayment audit, the following issues of the same publication: June 4, 1938, p. 1310; January 14, 1939, pp. 62, 94; September 14, 1940, p. 615.

[10] This Association, as its name implies, serves as the official spokesman for the railroad industry in the United States. Formed in 1891, its membership includes, although it is not restricted to, the operators of the Class I railroads. Its various divisions and committees deal with every major phase of the industry. See United States Department of Commerce, *National Associations of the United States* (1949), pp. 246, 252. As will be seen below, the Association actively participates in hearings on proposed legislation affecting the interests of its members.

auditing office as might be desired for audit. *In the event that this audit reveals an overpayment, then claim be presented to the carrier for the amount thereof which will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit.* Attention is further directed to the fact that the railroads would never have, under such a plan, more money than the Government lawfully owed for the reason that the Government is shipping daily and is currently obligated to the railroad companies for transportation charges. This would place the handling of governmental transporfation charges on substantially the same basis as applies in connection with commercial transactions.

I am very sure from our previous negotiations with you and others connected with the Government with regard to the same subject that there exists no differences as between us as to the necessity of more prompt payment than has heretofore prevailed. *I hope that you and your associates may consider the suggestions contained herein as reasonable and practical and that we may rely upon your good offices to bring about some such arrangement.* [Emphasis added.]

This recommendation was transmitted to the General Accounting Office by the Department of the Treasury. On December 13, 1937, the Acting Comptroller General ruled (Decision A-90400) that under existing law he could not authorize the payment of transportation bills without a prior determination with respect to the cor-

rectness of the amounts charged. Such determination, in his view, was necessary in order to relieve administrative and disbursing officers of their statutory liability for any overpayments resulting from the utilization by carriers of erroneous or unauthorized rates. The Acting Comptroller General went on to observe, however, that he did not, and would not in the future, require the audit of bills by the General Accounting Office itself prior to their payment.

2. *Legislative history of Section 322.* Approximately a month after the report of the President's committee of three was transmitted to Congress, bills were introduced in both the Senate and the House of Representatives providing for the elimination of land-grant rates on Government transportation. S. 3876, 75th Cong., 3rd Sess., introduced April 20, 1938 (83 Cong. Rec. 5569); H.R. 10620, 75th Cong., 3rd Sess., introduced May 12, 1938 (83rd Cong. Rec. 6842). Doubtless as a result of the thinking reflected in the Association of American Railroads' letter to the Department of Treasury, S. 3876 further provided (Section 2) that:

> "* * * Payment for the transportation of any such persons or property shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

On June 1, 1938, R. V. Fletcher, then General Counsel of the Association of American Railroads, testified before the House Committee on Interstate and Foreign

Commerce in connection with H.R. 10620. In the course of his testimony, Mr. Fletcher called the Committee's attention to Section 2 of S. 3876, and stated:

> Now, if Congress could be persuaded to pass that section or to incorporate that section in this bill, it would relieve the railroads from a very embarrassing situation growing out of the fact, as will be shown to the committee by a later witness, in detail, that the Government always owes the railroads a very considerable amount of money due to the delay in having their bills checked and audited and approved by the General Accounting Office.
>
> * * * frequently 10, 15, or 20 million dollars are tied up for a considerable period of time over in the General Accounting Office awaiting a careful preaudit of those bills, while under the law other shippers must pay upon presentation of bills or delivery of the freight within a period of 3 or 4 days.
>
> The Government pays its bills to the railroads only after this careful check and preaudit, which causes a lot of delay in the payment of bills and ties up a great deal of money badly needed by the railroads. If that section could be put in here, it would require the payment of the bills by the Government as they are rendered by the railroads, with the privilege, however, of course, if it should develop that there has been an overpayment, the Government may deduct that amount from subsequent bills.[11]

[11] Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 10620, 75th Cong., 3rd Sess., June 1, 1938, pp. 34-35.

Neither H.R. 10620 nor S. 3876 was enacted by the 75th Congress. In the early months of the 76th Congress, however, several bills were introduced in both houses incorporating the provisions of Section 2 of S. 3876. Some of these bills, in common with those previously introduced, dealt exclusively with the transportation of Government property.[12] Others were omnibus transportation bills, dealing with many other matters as well.[13] One of the omnibus bills was drafted by, and introduced at the behest of, a committee of six representatives from railroad management and labor and was familiarly known as the "railroad bill".[14]

Mr. Fletcher again testified before the House Committee on Interstate and Foreign Commerce on behalf of the Association of American Railroads, and urged

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[12] See, *e.g.*, S. 1915, 76th Cong., 1st Sess., introduced March 23, 1939 (84 Cong. Rec. 3143); S. 1990, 76th Cong., 1st Sess., introduced March 30, 1939 (84 Cong. Rec. 3509). Section 1 of both of these bills dealt with the elimination of land-grant rates; Section 2 with the payment of transportation bills upon presentation.

[13] See, *e.g.*, H.R. 2531, 76th Cong., 1st Sess., introduced January 13, 1939 (84 Cong. Rec. 345); H.R. 4862, 76th Cong., 1st Sess., introduced March 8, 1939 (84 Cong. Rec. 2512). Section 501 of Title V of H.R. 2531 and Sections 201 and 202 of Title II of H.R. 4862 concerned Government traffic. Their provisions were substantially the same as the provisions in S. 1915 and 1990, note 12, *supra*.

[14] H.R. 4862, n. 13, *supra*. See Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 4862, 76th Cong., 1st Sess., March 7-30, 1939, p. 1101.

This "committee of six" had been appointed by the President on September 20, 1938, to supplement the study of transportation problems which had been previously undertaken by the three members of the Interstate Commerce Commission. See p. 15, *supra*. The committee's report and recommendations as to legislation were presented to the President on December 23, 1938. See Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 2531, 76th Cong., 1st Sess., January 24, 1939, p. 17.

the passage of the provision in H.R. 2531 (an omnibus bill) pertaining to Government payment upon presentation of charges. See Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 2531, 76th Cong., 1st Sess., February 24, 1939, pp. 652-653.[15] At the same hearing, a representative of the trucking industry called upon the Committee to broaden the provision so as to encompass motor carriers as well, observing (*id.* at p. 472):

> Some of our carriers have had to wait from 6 months to a year to get their money from the Government. We want to be accorded the same treatment you gave the railroads.

Unlike the above bills (none of which were enacted), the omnibus transportation bill which eventually became the Transportation Act of 1940 did not, in its original form, contain any provisions respecting Government traffic. This bill (S. 2009, 76th Cong., 1st Sess.) was introduced by Senators Wheeler and Truman on March 30, 1939, and was referred to the Committee on Interstate Commerce. That committee reported it out on May 16, 1939 [S. Rept. 433, 76th Cong., 1st Sess.) following which, on May 29, 1939, it was introduced in the House and referred to the Committee on Interstate and Foreign Commerce. On July 18, 1939, the House Committee reported it, having in-

[15] H.R. 2531, as introduced, called for payment upon presentation of bills for the transportation of "persons or property" for the Government. *Hearings*, p. 17. Mr. Fletcher requested that it be amended so as to apply to the transportation of the mails as well. H.R. 4862 (the bill introduced on behalf of the railroads some two weeks thereafter) reflected this suggested change. See Hearings on H.R. 4862, n. 14 *supra*, p. 21, p. 1879.

serted, in the meanwhile, the payment-upon-presentation provision as Section 322.[16] The Section survived two subsequent joint conferences (H. Rept. 2016, 76th Cong., 3rd Sess.; H. Rept. 2832, 76th Cong., 3rd Sess.) and on September 18, 1940, was enacted in its present form.

In sum, Section 322 was designed to serve the single purpose of enabling common carriers to obtain the prompt payment of their bills. The legislative history of the Section shows that it was inserted in the Act solely by reason of the insistence of industry spokesmen that the delay attendant on pre-payment examination of bills gave rise to economic hardship. There is not the remotest indication that Congress was motivated by any other consideration. Specifically, there is nothing in the hearings, reports, or debates to suggest an intent to shift from the carrier to the Government the burden of proof respecting the correctness of the carrier's claim.[17]

[16] The Committee's explanation of the addition was simple: "Section 322 provides for prompt payment to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States and includes a provision for deduction of overpayments." H. Rept. 1217, 76th Cong., 1st Sess., p. 28.

[17] It is to be noted that at no point during the course of the legislative consideration of Section 322 was it opposed or questioned by representatives of the Government. In his letter of April 28, 1938, to the Chairman of the Senate Committee on Interstate Commerce in connection with S. 1915 (see n. 6, *supra*, p. 15), Attorney General Murphy stated that he had no objection to the enactment of the bill. The Comptroller General was not requested to express his views. See Hearings Before the Procurement and Buildings Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Investigation of Procurement and Buildings, Part 7, 80th Cong., 2nd Sess., June 2, 1948, pp. 1049-1050. We doubt this would have been the case had there been the slightest suggestion that Section 322 would relieve carriers of the burden of proving doubtful claims.

3. *Administrative practice under Section 322.* Following the enactment of the Transportation Act of 1940, the former governmental practice of pre-auditing the bills of common carriers was terminated. As the Acting Director of the Budget advised the President in a letter of June 7, 1941, which was then forwarded to the Congress in connection with proposed appropriations legislation (H. Document 249, 77th Cong., 1st Sess., p. 2):

> [Section 322] is construed as implying that Congress recognized that the delay in prompt payment is caused by the time required to verify transportation rates, freight classifications, and land-grant deductions prior to payment of carrier bills. *It is also believed that Congress had in mind that the audit or settlement by the General Accounting Office of such transportation bills would provide sufficient protection of the Government interests.* [Emphasis added.]

And by the Act of June 1, 1942, 56 Stat. 306, 31 U.S.C. 82(g), Congress expressly exempted disbursing and certifying officers from liability for overpayments made "for transportation furnished on Government bills of lading or transportation requests when said overpayments are due to the use of improper transportation rates, classifications, or the failure to deduct the proper amount under land-grant laws or equalization and other agreements." See, also, Section 2 of the Act of December 29, 1941, c. 641, 55 Stat. 875, 876.

The present procedure calls for post-payment audit of carriers' bills by examiners in the Transportation

Division of the General Accounting Office.[18] Should the examiners conclude that there has been an overpayment, or at least that the relevant material at their disposal leaves serious doubt as to the correctness of the charges, the carrier is promptly so advised on a standard General Accounting Office form and is requested to make refund. The carrier then has the opportunity to demonstrate that the administrative conclusion is erroneous in fact or in law. It, of course, may submit additional information in its possession which supports its claim. In the event that the carrier does not either refund or satisfactorily resolve the doubts, a deduction is made from a subsequent bill as provided by Section 322. See *Annual Report of the Comptroller General for the fiscal year ending June 30, 1943*, pp. 44-47; *Annual Report for the fiscal year ending June 30, 1944*, pp. 46-51.[19]

[18] We are advised by the General Accounting Office that each bill is subjected to two independent audits.

[19] That the post-payment audit of transportation bills by the General Accounting Office is a large-scale operation is seen from the activities of its Transportation Division during the fiscal year ending June 30, 1951. With respect to freight transportation, 633,706 vouchers, covering over two and one-half million bills of lading, were audited. 25,591 notices of overpayment, involving over six million dollars, were submitted to carriers. With respect to passenger transportation, 400,639 vouchers, covering almost three million transportation requests were audited. 11,015 notices of overpayment, involving nearly $700,000 were sent out. *Annual Report of the Comptroller General for the fiscal year ending June 30, 1951*, pp. 31-32.

The Second World War placed even a greater burden upon the General Accounting Office. In the fiscal year ending June 30, 1946, for example, it collected over fifty-seven million dollars from common carriers through the audit of transportation bills. *Annual Report of the Comptroller General for the fiscal year ending June 30, 1946*, p. 22. And cf. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 74, n. 17.

The terms of Section 322 fully conform to the consistent administrative view that the Section contemplates a conditional payment to the carrier, and that where the post-audit discloses, as here, the probability of error, the carrier is obliged to make refund at that point.[20] If the Congressional purpose had been to allow the carrier to retain the full amount of the payment to it unless and until the Government demonstrated to the satisfaction of the carrier or a court that there had been an overcharge, the deduction provision would not have been inserted at all. Stated otherwise, Congress hardly would have conferred express authority upon the General Accounting Office to compel restitution on the sole basis of the administrative determination, if it had not regarded that determination as sufficient justification for putting the carrier to the burden of proving its disputed claim in court.

In its recent decision in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, this Court explicitly recognized the conditional nature of the pre-audit payment made under Section 322. Rejecting an argument by the carriers that the Government, in order to protect itself against the exaction of an unreasonable rate, must file an affirmative claim for reparations with the

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[20] The construction given to Section 322 by the General Accounting Office, the legislative agency charged with its administration and with the supervision of Government fiscal matters generally (see pp. 12-14, *supra*), is entitled to great weight. *United States* v. *Bergh*, 352 U.S. 40, 46-47; *Inland Waterways Corp.* v. *Young*, 309 U.S. 517; *United States* v. *Jackson*, 280 U.S. 183, 193; *United States* v. *Citizens Loan & Trust Co.*, 316 U.S. 209, 214; *United States* v. *Madigan*, 300 U.S. 500, 506; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549; *Adams* v. *United States*, 319 U.S. 312, 314-315; *Edward's Lessee* v. *Darby*, 12 Wheat. 207, 210.

Interstate Commerce Commission within the two-year period prescribed by Section 16(3) of the Interstate Commerce Act, 49 U.S.C. 16(3), the Court observed (352 U.S. at 74):

> * * * Congress has relieved the Government from filing such anticipatory suits by expressly authorizing the General Accounting Office to deduct overpayment from subsequent bills of the carrier, if, on post-audit, it finds that the United States has been overcharged. *This right was thought to be a necessary measure to protect the Government, since carriers' bills must be paid on presentation and before audit. On respondents' theory the Government could invoke the right only at the peril of losing its defenses in a later suit by the carrier. Evidently this was not the purpose of Congress in authorizing unilateral set-off.* [Emphasis added.]

And with respect to the carriers' reliance, in another connection, upon the payment *ab initio* of the full amount of their bills the Court stated (352 U.S. at 75):

> The fact that the Government paid the carrier's bills as rendered is without significance in light of § 322 of the Transportation Act, *supra*, requiring payment "upon presentation" of such bills and *postponing final settlement until audit.* [Emphasis added.][21]

[21] The private shipper, who is required by Section 3(2) of the Interstate Commerce Act, 49 U.S.C. 3(2), to pay freight charges promptly, cannot set off an overpayment against the charges for other transportation services rendered to it. The coupling of the requirement of pre-audit payments with a specific provision for recoupment of overpayments negates the suggestion of the court below (R. 43-44) that Section 322 was meant to place the Govern-

Properly viewed, in its setting, Section 322 represents the fulfillment of the legitimate interests of both the carriers and the public treasury. The carrier promptly obtains the use of the money which, according to its bill, is due it, and it is thus spared the substantial delay occasioned by the former pre-auditing practice. But any amount received by the carrier which would not have been paid had pre-audit taken place is to be refunded. In short, an administrative determination that overpayment was made obliges the carrier to do precisely what the Association of American Railroads represented would be done:—to refund promptly, reserving the right "to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit." (See p. 18, *supra*). The deduction provision simply provides the Government with a method of insuring that the *status quo ante* is, in fact, restored.

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ment in precisely the same position as that occupied by private shippers. The force of this conclusion is not lessened—but, if anything, is strengthened—by the long settled principle that, even in the absence of a specific statutory authorization, the Government enjoys the right "which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot* v. *United States*, 15 Pet. 336, 370. Indeed, the Government's general power to withhold and apply goes beyond that of an "ordinary creditor", and confers upon the Comptroller General "[the] power * * * to strike a balance between the debts and credits of the government, subject to [judicial] review." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-240; cf. *Mulligan* v. *United States*, 207 F. 2d 897, 898 (C.A. 2); 31 U.S.C. 227; 28 U.S.C. 2501. Had Congress desired to equate the Government and private shippers, it would have specifically rendered this principle inapplicable to transportation matters, instead of inserting an explicit authorization of administrative offset.

C. Respondent's Obligation to Prove the Correctness of Its 1944 Bills Was Not Affected By Its Institution of Suit on the Later Bills From Which the Deduction Authorized by Section 322 Was Made.

Notwithstanding the above considerations, the court below has interpreted Section 322 in a manner which gives carriers a means of avoiding their traditional obligation to prove that their claims against the Government are lawful and proper. The decision also leads to completely anomalous results.

Thus, if it is administratively determined that an overpayment has taken place and the carrier thereupon makes refund—the common practice until now [22]—the carrier has recourse by suit under the Tucker Act to recover the refund. Like any other claimant asserting an unsatisfied contractual claim against the United States, a carrier, in such a suit, is put to its proof. Had respondent refunded, instead of compelling a deduction, its recovery in this action would be conditioned on a demonstration that its 1944 bills were correct.

But if, instead of refunding, the carrier requires the Comptroller General to make a deduction from a subsequent bill, then, under the holding below, the carrier has no such burden. It can then bring suit on the subsequent bill, without reference to the earlier bills which occasioned the deductions. This device, according to the Court of Appeals, makes it necessary for the Government to bring the earlier shipments into issue

[22] We are advised by the General Accounting Office that, during the fiscal year ending June 30, 1956, carriers refunded a total of $40,941,188.78. The amount deducted from subsequent bills during that same period totaled $11,155,837.72. During the preceding fiscal year, the total amount refunded was approximately two and one-half times the amount deducted.

by way of "setoff" or "counterclaim" and to prove affirmatively that the disputed charges, paid without audit, were incorrect.

This line of reasoning led to the conclusion in this case that, simply because it had elected to bring suit on its concededly correct bill for the 1950 shipment, respondent had no need to set forth any facts relating to the 1944 shipments. Throughout the litigation, respondent itself has placed virtually exclusive reliance upon this election on its part.[23]

This theory, with its accompanying frustration of the legislative purpose underlying Section 322 and its damaging effect upon the protection of the public treasury against the payment of improper claims, cannot be justified. Respondent has been paid in full on its concededly correct 1951 bill (for the 1950 transportation) —partly in cash and partly by way of credit against the prior overpayments. Its sole grievance, as the plead-

[23] In its brief in the Court of Appeals, respondent discussed the Government's observations respecting the traditional obligation of the claimant to establish the validity of its claim in these terms (pp. 3-4):

> [Respondent] has no quarrel with that theorem. It certainly neither denies nor disagrees with such a clear legal principle. In this case [respondent] has complied with every facet of that platitude. The "claim" of the carrier is for transportation charges earned in 1950 by virtue of delivery of a carload of household effects to the Government at Newport, Rhode Island. The "validity" of the claim depends upon the contract and the applicable tariffs, both of which the Government admits in paragraphs 2 and 3 of its substitute answer (R. 5). Thus, as a claimant against the Government in this case, [respondent] has "established" the validity of its claim. Having once established its claim against the Government, [respondent] has no further duty to prove entitlement to recovery. Where a plaintiff has established the truth of its allegations and the defendant still thinks it should not pay, it is up to that defendant to do some establishing of its own.

ings establish (*supra*, p. 5), is that it has been paid less than what it considered itself entitled to for the 1944 transportation. Whether that grievance is legitimate provides the only issue to be litigated. The burden of proof on that issue is determined by the statutory scheme. It cannot be made to depend upon whether the complaint (as distinguished from the pleadings as a whole) is artfully elliptical.

It is to be noted that carriers have occasionally chosen to make a partial refund, leaving it to the Government to deduct from future bills the balance of the administratively determined overpayment. See, *e.g.*, *Wabash Railroad Co.* v. *United States*, 130 C. Cls. 645, 647. Acceptance of respondent's position would mean that, had that been done here, respondent would have been bound to prove the correctness of its bill for the 1944 transportation in order to recover the *refunded* sums; to recover the *deducted* amount, however, it would have had to prove simply the validity of a subsequent bill not itself in dispute. It is difficult, indeed, to perceive a rational basis for such a result.[24]

[24] A still further variation is reflected by *United States* v. *Western Pacific R. Co.*, 352 U.S. 59. That case involved the transportation by three carriers of steel bomb cases filled with napalm gel. Each carrier charged the rate applicable to incendiary bombs. Two of the carriers (Bangor and Seaboard) were paid the full amount of their charges but, following a post-audit determination that a lower rate applied, deductions were made from other bills. By the time the third carrier (Western Pacific) submitted its bill, the Government transportation officers involved were aware of the Comptroller General's determination as to the applicable rate and, accordingly, made payment on the basis of that rate. As the present respondent views the matter, in the ensuing litigation Western Pacific was obligated to prove the applicability of the charged rate, but the other two carriers were not. There is of course nothing in this Court's opinion to indicate an acceptance of such a difference in treatment. Cf. pp. 32-34, 35-36; *infra*.

Looking to the realities, respondent is seeking funds recouped from it because, in the first instance (*i. e.*, in 1944), it billed the Government and collected upon the basis of equipment which not only was not ordered, but, more importantly, was unnecessary in the performance of the transportation involved. Its right to the disputed amount is dependent solely upon its having been entitled to charge for the unordered and unneeded freight cars.

This Court has regularly looked through form to substance in delineating the issue when an action is brought following an administrative deduction from an undisputed claim. In *Reynolds* v. *United States*, 292 U. S. 443, the plaintiff sought to recover a deduction, made from his veteran's pension, of the cost of his hospitalization in a Government institution. Had the action been regarded as one based upon the undisputed claim, *i. e.*, the pension, the court would not have had jurisdiction. Judicial Code of 1911, Section 145, 28 U. S. C. (1940 ed.) 250(1), now 28 U. S. C. 1501. This Court held, however, that the propriety of the deductions was the only question in the case (292 U. S. at 447).

Alcoa Steamship Co. v. *United States*, 338 U. S. 421, provides an even closer analogy to this case. There, the Government paid, upon presentation, the carrier's bill rendered in connection with the shipment of a cargo of lumber on a Government bill of lading. On the post-audit, the Comptroller General discovered that the vessel had been sunk by an enemy submarine, with a total loss of its cargo. As a consequence, he disallowed the payment of the bill and deducted an equivalent amount in making payment on admittedly correct bills submitted by the carrier for the transportation of cargo on

two of its other vessels. The carrier (like respondent here) then brought suit under the Tucker Act on the conceded claim. In its answer, the Government, as here, set forth in detail the erroneous payment which provided the basis for its deduction. The Second Circuit recognized that, the form of the complaint notwithstanding, the charges for the later shipments did not constitute the real subject matter of the litigation. At the very outset of its opinion (175 F. 2d 661), it stated:

> The question in the case is whether the United States overpaid the freight due to the petitioner, * * * upon a cargo of lumber shipped upon the petitioner's ship, "Gunvor."

This Court expressed a similar view (338 U.S. at 422):

> "At bar is the single question of contract interpretation whether a carrier's "Goods or Vessel lost or not lost" provision survives the government standard form bill of lading.[25]

[25] Since the judgment of the court below in the present case, this Court has again implicitly repudiated the theory that a suit following a Section 322 deduction from a conceded bill raises an issue as to the correctness of anything but the carrier's original claim which was invalidated on post-audit. *United States* v. *Chesapeake & Ohio Ry. Co.*, 352 U.S. 77. While the carrier ostensibly brought suit on the conceded bill, the Court described the action as one "to recover the amount of [the] deductions" (352 U.S. at 79) and treated the case as if the invalidated claim had been sued upon directly.

Admittedly, the carrier itself, unlike this respondent, proceeded at all times on the assumption that its recovery hinged upon a showing that its original charges had been correct, with the result that the deduction had been improper. Until this case, however, that seems to have been a generally prevailing assumption. At least we know of no prior instance wherein a carrier has endeavored at trial to take advantage of the pre-audit payment of its bills in the fashion of this respondent. Cf. *United States* v. *Missouri-Kansas-Texas R. Co.*, 194 F. 2d 777, 778 (C.A. 5).

Similar recognition of the nature of judicial proceedings arising out of a Section 322 deduction prompted the promulgation by the Court of Claims, on March 11, 1953, of its "Memorandum Order as to Procedure in Common Carrier Cases," the complete text of which is set forth in Appendix A, *infra*, pp. 48-58. Under that order, a common carrier, within 30 days after its complaint is filed, must file with the Clerk a request for admissions by the Government of "the genuineness of any relevant documents described in and exhibited with the request and of the truth of the material matters of fact relied on by the carrier for recovery in the action." The statement in the request must be:

> * * * sufficiently explicit to show the nature of the dispute and the specific reason or reasons why the plaintiff believes it is entitled to recover higher rates or charges than those allowed by the Government. The word "dispute", as used in the preceding sentence, means *the shipment or shipments with respect to which the General Accounting Office or other agency of the Government determined that the carrier's charges had been overpaid or refused to pay the carrier's supplemental bills covering such shipments, rather than subsequent shipments which are not in dispute except for the fact that the overpayments determined as to the shipments in dispute have been deducted from the amount of the carrier's bills covering such subsequent shipments.* [Emphasis added.]

Additionally, the memorandum order requires the carrier to furnish a detailed schedule containing complete factual information as to "each of the carrier's bill-

for the shipments in dispute (as distinguished from the * * * subsequent bill from which the GAO made a deduction following its determination of an overpayment on the bill in dispute)." The order further requires a response by the Government admitting, denying, or modifying the facts set forth in the request, or advancing the reasons why it cannot do so (*e. g.*, that there is insufficient information in its possession). The failure of the carrier to comply with the provisions of the order may lead to the imposition of severe sanctions.[26]

If, as the pleadings in the instant case show, and as both Section 322 and this Court's holdings dictate, the present suit is deemed to involve solely the question of the validity of the 1944 charges, the distinction that respondent seeks to draw respecting the burden of proof of the refunding and non-refunding carrier evaporates. Whether or not the carrier has honored the demand for restitution occasioned by the post-audit, it is subject to the principle (see pp. 12-14, *supra*) that it is incumbent upon the claimant against the Government to establish the correctness of those of its claims which are in issue.

Even in the absence of the special considerations present where Section 322 is involved, this Court has recognized that the traditional right of the United States to require a full showing by the claimant is not defeated by the fact that the latter, in the first instance, received full payment on its claim. *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112. In that

[26] The Commissioner may (1) refuse to allow the carrier to support designated claims or prohibit it from introducing in evidence designated documents or items of testimony; or (2) may report the carrier's noncompliance to the court for appropriate action, which may include dismissal of the petition or any part thereof.

case, the Postmaster General had concluded that for a period of twelve years the Government, by reason of a continuing mistake of fact, had overpaid the carrier for the transportation of mail. He thereupon deducted from a current bill the amount of all prior overpayments. The carrier brought suit under the Tucker Act, challenging the deduction. Speaking for a unanimous court, Justice Brandeis rejected the contention that the validity of the deduction should have been established by the Government before it was made, observing that the United States "was under no obligation to establish the illegality [of the prior overpayments] by suit" (252 U.S. at 121). Establishing the illegality of the payments to respondent in 1944 is, of course, precisely what the court below has held that the Government was obligated to do.[27]

With one qualified exception (see p. 38, note 29, *infra*), the lower courts have likewise placed the full burden on the claimant to prove that a deduction by the United States was improper, *i.e.*, that the claim actually in issue was correct.

In *Suncook Mills* v. *United States*, 44 F. Supp. 744 (D. Mass.), which arose in the same district court as this case, the Comptroller General had set off against a concededly correct claim an indebtedness to the United States arising from alleged overpayments to

[27] In its brief in opposition (p. 8), respondent endeavored to distinguish *Grand Trunk Western* on the ground that suit was here brought on the conceded claim. For the reasons already developed, this purported distinction is without merit. And we think there is a similar lack of substance to respondent's additional assertion that the *Grand Trunk Western* case must be read as meaning that, while the Government need not establish the incorrectness of the carrier's claim prior to making the deduction, it must do so should the deduction be contested by the carrier in a judicial proceeding.

plaintiff in connection with prior contracts performed by it. Plaintiff then brought suit on the conceded claim to recover this deduction. Determining initially that plaintiff had been overpaid on the earlier contracts unless it had paid certain federal processing taxes which had been included in the bid price on those contracts, the court entered judgment for the Government on the ground that (44 F. Supp. at 746):

> * * * The burden of proof with respect to this matter was on the plaintiff and I find it has failed in its attempt to show that the processing taxes were paid * * *.

In *Eastport Steamship Co.* v. *United States*, 131 C. Cls. 210, the plaintiff had recovered a judgment against the Government from which the Comptroller General had deducted certain amounts purportedly owed the United States by the carrier on a bareboat charter. See 31 U.S.C. 227. The carrier then brought suit to recover the deduction. While the Court of Claims determined, incorrectly we think, that for jurisdictional purposes the suit was to be regarded as on the judgment rather than on the charter,[28] it nevertheless went on to hold that (131 C. Cls. at 212):

> * * * To [recover plaintiff] must show that [the Government] has no claim against plaintiff for the money withheld; which is to say, that plaintiff is not liable to [the Government] on the bareboat charter.
>
> * * * * *

[28] Cf. *Reynolds* v. *United States*, *supra*, p. 32.

> * * * [I]t is the [Government] who is asserting a claim under [the] charter. It asserts it in quite an effective way, by withholding from plaintiff money otherwise due it. This makes it necessary for plaintiff, in order to get the money, to show it is not liable to [the Government] on the charter and, hence, that the withholding is wrongful.

In *Buch Express, Inc.* v. *United States*, 132 C. Cls. 772, certiorari denied, 351 U. S. 940, the carrier had charged the Government for the transportation of certain radar equipment at the double first-class rate applicable to "Range or Height Finders" and "Scientific Instruments, N. O. I." On the Section 322 post-audit, the Comptroller General determined that the shipment came within an entirely different classification which carried the first-class rate. Pursuant to Section 322, he then deducted the difference from sums due the carrier on other shipments. The Court of Claims observed (132 C. Cls. at 776):

> * * * It is noted at the outset that the question in this case is one of fact, *i. e.*, under which classification heading of the tariff do [the radar sets involved] fall. Plaintiff has the burden to show (1) that the classification of this equipment [deemed applicable by the Comptroller General] is wrong and (2) that its classification as either "Range or Height Finders" or "Scientific Instruments, N. O. I." * * * is correct.
>
> We believe the plaintiff has failed to meet the burden of proof on both issues. * * * [29]

[29] It is true that in *Atlantic Coast Line R. Co.* v. *United States*, 140 F. Supp. 569, which involved material facts closely analogous to those of the present case, the Court of Claims expressed the view

The same principle, we submit, controls here. The carrier's burden was to establish that its disputed charges were correct. That duty cannot be met by an allegation that later bills, not in dispute, were correctly rendered.

II. In any Event, the Government Made a *Prima Facie* Showing That Respondent's 1944 Charges Were Incorrect.

Even if this Court should decide that, contrary to the views expressed above, the Government had the initial burden with respect to the correctness of respondent's charges for the 1944 transportation, its burden was satisfied by a showing that respondent delivered cars of a type other than that which had been ordered. This follows from the fact that whether respondent was entitled to furnish, and charge on the basis of, unordered and unnecessary cars hinged upon the resolution of a factual matter within the peculiar knowledge of respondent.

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that "the Government * * * has the burden of persuading us as to the validity of its offset" (although that court, in contrast to the court below in this case, went on to put the burden of going forward on the carrier; see p. 43, *infra*). This expression was not accompanied by any discussion of the considerations heretofore detailed; nor was there mention of the court's earlier holdings to the contrary in *Buch Express* and *Eastport Steamship*.

Further, it is interesting to compare the Court of Claims' statement respecting the burden of proof with its prior disposition of the carrier's motion for summary judgment. *Atlantic Coast Line R. Co. v. United States*, 112 F. Supp. 594. Determining that the sole question before it was whether the carrier had overcharged on the earlier shipments, and that the answer to this question was dependent upon whether cars of the size ordered had been available (see pp. 41-43, *infra*), the court had denied the motion on the ground that (112 F. Supp. at 597):

> In the instant case the plaintiff does not allege that the initial carrier was unable to furnish cars of the size ordered by the Government.

A. *Respondent Could Charge on the Basis of the Furnished Cars Only If the Ordered Equipment Was Unavailable*

It was long an unwritten rule that a carrier, by publishing a tariff listing various sizes of cars, held itself out as being able to furnish them and, consequently, could not charge the shipper more because it furnished cars different from those ordered. *Kaye & Carter Lumber Co.* v. *M. & I. Ry. Co.*, 16 I.C.C. 285. This doctrine was formalized by the Interstate Commerce Commission in Section 6(a) of Rule 34, which, under the heading of "Shipments on Open Cars," provided that:

> If carrier is unable to furnish open car of length ordered, and furnishes longer car, minimum weight shall be that fixed for car furnished, except that if articles are of such length as could have been loaded on car of length ordered, minimum weight shall be that fixed for car ordered.

On January 30, 1942, the Commission promulgated Service Order No. 68. In the preamble, the Commission pointed out that the war emergency required immediate action to prevent shortages of railroad equipment and traffic congestion and that the provisions of Rule 34 in respect to the furnishing, substitution, and use of multiple cars for single shipments, subject to car load rates, resulted in wasteful car service. Cf. *Procter & Gamble Co.* v. *Pennsylvania R. Co.*, 270 I.C.C. 393. The order itself then provided in part that the operation of Rule 34:

> * * * in so far as it permits railway freight cars to be used for the shipment of carload freight otherwise than subject to the carload minimum

weight for each car used be, and it is hereby, suspended.

In *Atlantic Coast Line R. Co.* v. *United States*, 112 F. Supp. 594 (C. Cls.), involving the same situation as here presented, the carrier's principal contention was that the suspension of Rule 34 by Service Order No. 68 had the effect of foreclosing carriers from charging less than the charges for the minimum weights applicable to the type of cars actually used, no matter what type of car had been ordered by the shipper. This construction was flatly rejected by the Court of Claims. Noting that, by its terms, Section 6(a) of the Rule applied only to situations where the carrier was unable to furnish a car of the length ordered by the shipper, the court concluded (112 F. Supp. at 596):

> * * * [T]he suspension, by Service Order No. 68, of unspecified portions of Rule 34 [has] no application to situations where the carrier, though able, did not furnish a car of the size ordered. Since 6(a) did not apply, the suspension of 6(a) would also not apply.

The court then considered, and also rejected, the carriers' additional argument that Service Order No. 68 operated to suspend the unwritten rule enunciated in the *Kaye and Carter Lumber Co.* case, *supra*. It reasoned (112 F. Supp. at 596-597):

> If cars of the size ordered were available it would take no longer to furnish them than it would to furnish other cars, and unnecessarily furnishing longer cars would accomplish only two things: (1) waste of space in cars and of fuel in hauling them

partly empty; and (2) an increase of charges to the shipper for which he got nothing in return. If cars of the size ordered were not available, we can see how Service Order No. 68 might expedite the use of cars. The railroad would not have a tendency to hold back the furnishing of a larger car, as it would under Section 6(a) when it was not going to get paid for the extra size of the car. It would furnish promptly whatever car it could, the shipper would probably accept it, and the shipment would get on its way. While this does not seem to us to be a very cogent justification for Service Order No. 68, as applied to Section 6(a), it must be that, in the expert and informed judgment of the Commission, it was thought that it would serve a useful purpose. But in the situation discussed above where a car of the size ordered was available, it could have served no useful purpose at all and its effects would have been harmful and wasteful. Since the Commission which promulgated it has denied that it was intended as a rate-raising measure, and since its application to such a situation would not improve car service, but would have the opposite effect, we construe the order as not applying to that kind of a situation. We further conclude that if it was intended by the Commission to apply to such a situation it was invalid since it was promulgated under the Commission's authority, granted by the provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C.A. §1 (15), to in an emergency requiring immediate action, suspend the operation of rules, regulations, or practices relating to car service. Under this

authority, the Commission could not take action the only effect of which would be to make car service worse.

The Court of Appeals below accepted the manifest correctness of this holding that, in 1944, a carrier could charge for the unordered equipment which it furnished only if the type of car requested by the shipper was unavailable (R. 41). Moreover, while respondent placed reliance on Service Order No. 68 in the District Court (R. 6), it abandoned that reliance in the Court of Appeals and in its brief in opposition to certiorari in this Court.

B. *Whether the Ordered Equipment Was Available Is Within Respondent's Peculiar Knowledge and the Burden of Proof Could Not Be Imposed Upon the Government*

It is apparent that the carrier, rather than the shipper, must be presumed to know, or have access to, the pertinent information on the question of the availability of cars of the type ordered. Cf. *Atlantic Coast Line R. Co. v. United States*, 140 F. Supp. 569.[39] The record made on the respective motions for summary judgment precludes any other assumption here.

Uncontroverted statements show that the larger cars were "furnished for reasons peculiarly within the

[39] While, as heretofore noted (p. 39, note 29, *supra*), the Court of Claims incorrectly assumed in the cited case (140 F. Supp. at 572) that the "Government * * * has the burden of persuading us as to the validity of its offset," it went on to recognize that (*ibid.*) "*as a practical matter, the evidence as to availability of cars of the size ordered would be in the hands of the plaintiff railroad, and hence it was expected to give us all the information it had.*" [Emphasis added.]

knowledge" of the respondent "and or the initial carrier" and that the United States was "without knowledge of the reasons for the failure to furnish the [cars] ordered" (R. 21). To similar effect, see R. 22, 24, 25, 26.

Contrary to the suggestion of the court below (R. 47), it is irrelevant for present purposes whether the pertinent records are within the possession of respondent or in the possession of the initial carrier. Under the Railway Accounting Rules of the Association of American Railroads applicable to transportation on Government bills of lading, the terminal carrier was under a mandatory duty to collect, on behalf of all participating carriers, all charges on the shipment. See Association of American Railroads, *Railway Accounting Rules Effective October 1, 1944*, Rules 219, 220. The standard Government bill of lading contains a provision of like effect. Consequently, in collecting from the Government on the basis of the furnished cars, respondent clearly acted as agent for the initial carrier. It is accordingly responsible for the production of records within the latter's possession which have a bearing on the correctness of the charges. Cf. *Southern Pacific Co.* v. *Bank of America*, 29 F. 2d 465, 466 (C.A. 7).[31]

[31] Contrary to the views expressed by the court below (R. 47), it is also irrelevant that that there may have been an interval of several years between the initial payment of the carrier's bill and completion of the post-audit by the General Accounting Office (an almost inevitable delay in view of the volume of Government shipments, see p. 25, note 19, *supra*). Under the pre-1940 practice, an equivalent period elapsed during the pre-audit, i.e., between presentation and payment of a transportation bill. This certainly did not lessen the carrier's obligation to prove the correctness of a bill challenged by the pre-audit. And if the present post-audit practice means that the carrier must retain for a longer

In these circumstances, the ruling below that the Government was required to *disprove* the availability of cars of the type ordered conflicts with the consistent holdings of this Court that the burden may not be placed upon a litigant of establishing facts peculiarly within the knowledge of the adverse party. *Selma, Rome Etc. Railroad* v. *United States*, 139 U.S. 560, 566; *United States* v. *Denver and R. G. R. Co.*, 191 U.S. 84, 91-92; *Commercial Corp.* v. *New York Barge Corp.*, 314 U.S. 104, 111; *Federal Trade Commission* v. *Morton Salt*, 334 U.S. 37, 44-45; *SEC* v. *Ralston*, 346 U.S. 119, 126. See also *Tendler* v. *Jaffe*, 203 F. 2d 14, 18 (C.A.D.C.), certiorari denied, 346 U.S. 817; *Fleming* v. *Harrison*, 162 F. 2d 789, 792 (C.A. 8); *New York Life Ins. Co.* v. *Stoner*, 109 F. 2d 874, 876 (C.A. 8), reversed on other grounds, 311 U.S. 464; *Cliett* v. *Scott*, 102 F. 2d 725 (C.A. 5). In the *Denver & R. G. R. Co.* case, the Court emphasized (191 U.S. at 91-92):

> * * * The practical injustice of a different rule * * *. It would require the plaintiff not only to establish a negative, that is, that the timber was *not* cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant; it would impose upon the plaintiff a difficult if not an impossible task to require them to show that the timber was not cut for the construction or re-

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time those records which will be necessary to justify its charges in the event that some question arises in relation thereto, any resulting disadvantage is far outweighed by the advantage accruing to it from the prompt payment following presentation and the use by the carrier of public funds to the extent that the bills included overcharges.

> pair of the railway, though evidence that it was so out could be readily produced by the defendant. It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greenl. Ev. sec. 79, "that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." * * *

We submit that the insistence of the court below that the Government "establish a negative" here works no less an injustice.[32] The Government will rarely be in a position to disprove the carrier's assertion as to the availability of particular railroad equipment.[33] Un-

[32] While conceding that the record did not shed any light upon the "statistical chances" that carriers frequently substituted, for their own convenience, larger cars than those ordered, the court below nevertheless drew the inference from *Atlantic Coast Line R. Co.* v. *United States*, 140 F. Supp. 569, that it had been "the practice of the carriers to furnish cars of the type ordered if such cars were reasonably available" (R. 46). This inference was unwarranted, even if it be assumed (which we deny) that such a line of proof is adequate. In the *Atlantic Coast Line* case, the carrier, required to do so by the court, introduced secondary evidence to the effect that, *at the time and place in question*, the Texas and Pacific Railroad (which had supplied the equipment) always furnished the ordered cars if reasonably available. Recognizing that "[t]here were no doubt some cases, in which railroads, and perhaps this railroad, inexcusably failed to furnish shippers with cars of the sizes ordered," the Court of Claims accepted this evidence as establishing a practice at the particular location (140 F. Supp. at 572). Without discussing the matter of its sufficiency from the standpoint of the resolution of the issue before the Court of Claims, it is obvious that the custom of one railroad at one place does not establish a generally prevailing industry practice, let alone that the initial carrier here did not have the ordered cars available.

[33] As we noted in the petition for a writ of certiorari (p. 8), there are various other types of cases in which the matter of the burden of proof will be critical because the disposition of the controlling issue will depend upon information within the peculiar knowledge of the carrier.

controverted statements show that this is the situation here. See *supra*, pp. 43-44.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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AUGUST 1957

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Memorandum Order as to Procedure in Common Carrier Cases

(Issued March 11, 1953)

There are now pending in the Court several hundred cases brought by common carriers for the recovery of freight and passenger transportation charges, and additional suits of the same kind are being filed from time to time. A majority of them were brought during the pendency of proceedings for administrative settlement in order to avoid the bar of the statute of limitations. In many of these actions, there are few, if any, issues to be litigated, and the parties have sought and obtained the permission of the Court to suspend proceedings on the ground that the suits would be settled by administrative action; in others, there are issues to be litigated, but a substantial part of the material facts are not actually in dispute. Practically all of the cases require a consideration of freight classifications, tariffs, and related data, and involve determinations of the rates and computations of the charges due, based on the application of such classifications and tariffs. Nearly all of the actions have resulted from a determination made by the General Accounting Office or other Government agency that there was an overpayment of the carrier's charges by the Government or from refusal of the General Accounting Office or a Government corporation to pay supplemental bills submitted by carriers for claimed undercharges. In all the cases, the Department of Justice relies on the General Accounting Office and other agencies of the Government for the information required in the defense of the actions, including a redetermination by the General Accounting Office of the amounts due the carriers. In order to secure a more expeditious disposition of these cases,

including those to be litigated and those which may be disposed of by settlement without undue delay, it is the opinion of the Court that it is necessary to promulgate this special order, and therefore it is ordered this 11th day of March, 1953, that:

1. In all suits filed by common carriers on and after April 1, 1953, for the recovery of freight and or passenger charges, the carrier shall, at the time the petition is filed or within 30 days thereafter, file with the Clerk of the Court a request for admission by the defendant of the genuineness of any relevant documents described in and exhibited with the request and of the truth of the material matters of fact relied on by the carrier for recovery in the action. The request shall conform to the following requirements:

(A) The request, with accompanying schedules and documents, may be typewritten, or may be printed, mimeographed, or otherwise mechanically reproduced from a typewritten original, provided that all copies filed with the Clerk shall be clearly legible and that the words and figures shown therein shall be in large enough type to be read without difficulty.

(B) When the request is typewritten, an original to be retained by the Clerk and four copies to be served on defendant, as provided in Rule 2, shall be filed by the plaintiff. If the request is mimeographed, printed or otherwise reproduced from a typewritten original, the plaintiff shall, in addition to the five copies prescribed by the preceding sentence, file one additional copy for each Government agency for which the shipment or shipments in suit were made. Such additional copy or copies shall be served on defendant as provided in Rule 2.

(C) The request shall be signed by the attorney of record for the plaintiff. The statements con-

tained therein shall be properly separated and numbered and shall consist of specific statements of material facts which the plaintiff expects to prove as opposed to general allegations of the kind used in pleadings.

(D) There shall be attached to the request copies of any contracts, letters, or other documents (excluding the documents referred to in the schedules required by paragraphs 1(F) and 1(H) hereof) which plaintiff proposes to offer in evidence, in order that the genuineness of such documents may be admitted by the defendant and the necessity of calling a witness to identify the same may be avoided.

(E) The statements in the request shall be sufficiently explicit to show the nature of the dispute and the specific reason or reasons why the plaintiff believes it is entitled to recover higher rates or charges than those allowed by the Government. The word "dispute", as used in the preceding sentence, means the shipment or shipments with respect to which the General Accounting Office or other agency of the Government determined that the carrier's charges had been overpaid or refused to pay the carrier's supplemental bills covering such shipments, rather than subsequent shipments which are not in dispute except for the fact that the overpayments determined as to the shipments in dispute have been deducted from the amount of the carrier's bills covering such subsequent shipments.

(F) Where the claim is for the recovery of charges for the transportation of *property* for the Government, there shall be attached to the request a detailed schedule, prepared by or under the supervision of the general auditor, comptroller, or

other principal accounting officer of the carrier. The schedule shall contain the following factual information:

(1) The number of each of the carrier's bills for the shipments in dispute (as distinguished from the number of a subsequent bill from which the GAO made a deduction following its determination of an overpayment on the bill in dispute).

(2) For each bill of lading in dispute, covered by each bill referred to in (1) above, the following facts:

(a) The number and symbol of each bill of lading;

(b) the date of the shipment;

(c) the origin and destination of the shipment;

(d) a description of the commodity or commodities shipped, including a description of the packing where this affects the rate;

(e) car number and initial;

(f) the weight of the shipment, including the minimum carload weight when greater than the actual weight;

(g) when the shipment in dispute consists of one or more carloads of mixed commodities, a description of the different commodities and the respective weights thereof loaded in each car, including minimum carload weights where such weights affect the rates;

(h) the rates claimed for each article in the shipment and for any accessorial services;

(i) where land-grant rates are involved, the percentage of deduction, or the percentage to be paid;

(j) the total freight charges on each bill of lading;

(k) amounts refunded by carrier, if any;

(l) if the overpayment determined by GAO or other agency has been deducted from the carrier's subsequent bill or bills, the number of such subsequent bill or bills and the amount deducted;

(m) the total amount paid the carrier;

(n) the balance due;

(o) specific reference to the item or items in designated tariffs authorizing the charges claimed, including the classification rating if necessary, and authorization for any accessorial charges claimed; or to a Section 22 quotation;

(p) the Government file reference number as obtained from GAO Form 1003, the Certificate of Indebtedness, or other document issued by the GAO;

(q) if the shipment in dispute consists in whole or in part of a through transit movement, (1) the through assessable charges from the original point of shipment to the final destination, including a description of the commodity, the transited weight, the through rate—less land-grant deduction, if any—the tariff or special authority for the through rate used; and, if local tonnage is involved, the weight thereof, the points between which local tonnage moved and the rates and charges assessed against such tonnage; (2) detail of the net amounts paid to and beyond the transit station, including references to the "inbound" and "outbound" shipments by bill of lading number, and symbol, date of shipment, origin

and destination, weight, rate, and the net amounts paid to the respective "inbound" and "outbound" carriers, naming them and identifying the bill numbers on which such payments were made; and (3) the balance due, i.e., the difference between the through assessable charges, including the charges on local tonnage, if any, and the respective net amounts paid on the inbound and outbound shipments;

(r) a brief statement as to the basis for the claim or other brief statement which the carrier deems necessary to explain the peculiarities of the shipment.

(G) The schedule shall be certified by the general auditor, comptroller, or principal accounting officer of the carrier as follows:

I, ... the .....
(Name) (Title)
....., of the .....,
(Name of Carrier)
do hereby certify that the above and foregoing schedule has been prepared from the books and records of said company for use in a suit in the United States Court of Claims, entitled .....
..... vs. The United States, No. .....,
and that to the best of my knowledge, information, and belief the matters contained therein are true and correct.

To certify which, witness my hand at .....
..this .....day of .....,..... 19...

.....

Signature of General Auditor, Comptroller or principal accounting officer.

(H) Where the claim is for the recovery of charges for the transportation of *passengers*, for account of the Government there shall be attached to the request a schedule, prepared by or under the supervision of the general auditor, comptroller or other principal accounting officer of the carrier. The schedule shall contain the following factual information:

(1) The number of each of the carrier's bills in dispute, as distinguished from the number of a subsequent bill from which the GAO made a deduction following its determination of an overpayment on the bill in dispute;

(2) for each transportation request or warrant in dispute covered by each bill referred to in (1) above, the following facts:

(a) the symbol and number of each Government transportation request or warrant in dispute;

(b) the date of service;

(c) the origin and destination of the travel;

(d) the class or type of service;

(e) whether the travel was "one way" or "round trip";

(f) the number of the special movement, if any;

(g) the route of travel;

(h) the number of persons that traveled;

(i) the gross per capita fare;

(j) the amount of land-grant deduction;

(k) the assessable passenger charges;

(l) the amount paid;

(m) amounts refunded by carrier, if any;

(n) where an overpayment was determined by the Government and deducted from a car-

rier's subsequent bill, the number of such subsequent bill and the amount of the deduction;

(o) the total amount paid;

(p) the balance due;

(q) the tariff reference and item or special rate authority;

(r) the Government file reference;

(s) a brief statement as to the basis for the claim, including, where appropriate, a brief explanation showing the extent to which the ticket issued by the carrier was not used and the value of the unused part of the ticket.

(I). The schedule covering the transportation of passengers shall be certified in the same manner as provided in (G) above, except that where a request includes schedules pertaining to claims for both the transportation of passengers and freight, one certification shall suffice for all schedules.

2. Promptly after the filing of the plaintiff's request, the Commissioner to whom the case is assigned shall, by memorandum order filed with the Clerk, fix a reasonable time within which the defendant shall file its response to the request. A copy of such order shall be served on the parties as provided in Rule 3.

3. The defendant's response shall consist of an original to be filed with the Clerk and four copies to be served on plaintiff as provided in Rule 3. The response shall be signed by defendant's attorney of record and shall comply with the terms of paragraph 1(A) hereof.

4. The defendant shall file such response within the time fixed by the Commissioner, agreeing to the separate items of fact, modifying the same in accordance with the facts known by the defendant, specifically denying the same, or setting forth in detail the reasons why it cannot truthfully admit or deny designated portions of the request.

If the defendant finds that the schedule attached to the plaintiff's request, or any portion thereof affecting the amount claimed is incorrect, there shall be attached to the response a schedule prepared by the defendant, setting forth the facts and figures in detail with respect to any such incorrect items in plaintiff's schedule or schedules and containing a specific reference to the item or items in designated tariffs, Section 22 quotations or other authority relied on by the defendant.

5. Except where the response details the reasons why the defendant cannot admit or deny a particular statement in the request, any fact not so modified or denied in the response shall be deemed admitted, and the failure of the defendant to file its response within the time specified by the Commissioner shall be taken as an admission of all of the facts as set forth in the request.

Where the request sets forth any facts that are within the knowledge of the General Accounting Office or of the department or agency of the defendant for which the transportation was performed—and these specifically include but are not limited to the facts and figures which plaintiff, by this order, is directed to include in its schedules—a response stating that defendant cannot truthfully admit or deny such facts or a denial based on a lack of knowledge by defendant's attorney of record, shall be deemed an admission thereof: Provided, that such a response shall not be deemed an admission if accompanied by the sworn statement of the official in charge of the records that a search has been made for the necessary documents or information and that the documents or information cannot be found.

6. The Commissioner may invoke the provisions of this order with respect to any pending case of the class covered by the terms hereof, including cases in which

an interlocutory order has been entered by the Court in favor of the plaintiff on the issues of fact and law relating to the right of plaintiff to recover. In such pending cases, the Commissioner shall fix the time within which plaintiff's request, as well as defendant's response thereto, is to be filed.

The Commissioner may also invoke the provisions of this order, or applicable portions thereof as specified by him with respect to any case of the class covered by the terms of this order, where the trial in the first instance has been limited to the issues of law and fact relating to the right of plaintiff to recover. In that event, and in a case where the petition covers a number of bills of lading, involving a common issue of law or fact, the plaintiff's request and the defendant's response shall be limited to the matters that are essential to enable the Court to determine the issues of fact and law relating to the right of plaintiff to recover, and the schedules attached to plaintiff's request and to defendant's response shall cover only one typical bill of lading or such representative bills of lading as the Commissioner decides are necessary to enable the Court to determine the question of defendant's liability. If the Court holds that plaintiff is entitled to recover, it shall enter an interlocutory order, reserving the determination of the amount of the recovery for futher proceedings.

7. In all cases where the defendant's answer has not been filed at the time the provisions of this order are invoked by the Commissioner, the time for filing defendant's answer and any counterclaim asserted by it shall, without regard to the provisions of Rules 16 and 17, be contemporaneous with the date fixed by the Commissioner for filing defendant's response to plaintiff's request. At its option, the defendant may include the response in its answer or counterclaim, which plead-

ings, nevertheless, shall otherwise comply with the rules applicable to them.

8. The Commissioner may, in his discretion, grant necessary extensions of time for compliance with any of the provisions of this order and shall, prior to the time the case is submitted to the Court, resolve all questions and disputes with respect to the procedure to be followed in compliance with this order.

9. Where all genuine and material issues of fact are disposed of by the request and the response or by the defendant's failure to file its response within the time specified by the Commissioner, judgment may be entered on motion for summary judgment or on recommendation of the Commissioner as set forth in his memorandum report.

10. In the event a plaintiff in any action within the purview of this order fails or refuses to comply with the provisions hereof, the Commissioner may (i) refuse to allow it to support designated claims or prohibit it from introducing in evidence designated documents or items of testimony; or (ii) may report such noncompliance to the Court for appropriate action, which may include dismissal of the petition or any part thereof.

By the Court:

MARVIN JONES,
Chief Judge.

APPENDIX B

ASSOCIATION OF AMERICAN RAILROADS

Transportation Building
Washington, D. C.

October 5, 1937.

J. J. PELLEY, President.

Captain H. E. COLLINS,
Assistant Director, Procurement Division,
Treasury Department,
Washington, D. C.

Dear Captain COLLINS:

The railroads members of the Association of American Railroads, which comprise about 98% of all the Class I railroads in the United States, have been very much concerned by the long delay in securing payment for transportation services rendered for the U. S. Government. We know further, from conferences with the officers of the American Short Line Railroad Association, that their lines have been and are experiencing similar difficulty. These delays are not justified and the carriers should not be expected to finance the Government as they are now doing, insofar as transportation is concerned. Furthermore, the railroads are necessarily large borrowers and in that connection are required as a condition to their obtaining the necessary capital to pay substantial interest charges on all such borrowed money, whereas on the other hand the Government is paying no interest on its delayed payments to the railroad companies, which delays in many instances run over a year and invariably are not settled for sixty to ninety days. Although the railroads pay interest for the money they borrow, they cannot under the law collect interest from the Government

no matter how long settlements may be delayed. This is obviously unfair.

Under the law applicable to commercial shippers, transactions with railroads are required to be on substantially a cash basis. Shippers are required to pay freight charges within 48 hours, on a majority of the traffic, and in no case are they permitted credit in excess of 96 hours. It appears to us, and particularly under the present unfortunate financial position of the railroads, that the carriers ought to receive settlement from the Government within 96 hours after a bill has been presented and that would be possible providing the proper machinery were set up and the proper instructions issued.

This matter is of very much greater importance today than it has been in years past, for the reason that under present conditions the Government is engaged in shipping to a very much greater extent than ever before. Due to the various bureaus and other agencies, particularly in connection with relief work and in connection with some of the governmental corporations that have been organized, the Government is today handling much tonnage which was previously commercial traffic so that the delay in settlement for the transportation charges is much more serious to the railroads today than would have been the case a decade ago. It should also be borne in mind in connection with Government freight shipped under Government bills of lading the railroads are under the law not assessing their commercial rates but are making such discounts as the law requires because of land-grants and which in many instances today means the handling of this traffic on a basis below the actual cost of performing the service. These facts are mentioned only

as indicating the very great importance of providing some sort of a system which will permit the more prompt payment of these charges.

That you may have a picture of the situation, your attention is directed to the fact that as of July 1, 1937, there were 94,182 outstanding unpaid railroad bills against the Government amounting to $11,749,774, all of which bills had been rendered prior to May 1, 1937, and of these bills and this amount there was unpaid $4,683,946, representing 35,761 bills which had been rendered prior to January 1, 1937.

We feel very sure that you and the other officers of the Government will agree that this situation is one that is grossly unfair and that corrective action should be taken that will render impossible such long delays in payment for services rendered.

We are also of the opinion that it is not sufficient for us to simply complain of this situation but that in addition thereto we ought to suggest a remedy which in our judgment is both practical and legal and which can easily be made operative without the assumption of any risk insofar as the Government is concerned, providing you and your associates will put the suggested plan in operation and with such instructions issued as may be needed in connection therewith. With this thought in mind, we very respectfully submit for your consideration the following:

We believe that the delay in the payment of transportation charges by the Government to the railroads would be absolutely avoided if the various departments contracting for transportation were instructed to pay the bills as rendered and after payment have these bills referred to the General Accounting Office or such other governmental auditing office as might be desired for audit. In the event that this audit reveals an over-pay-

ment, then claim be presented to the carrier for the amount thereof which will be promptly paid by the railway, preserving, however, the right of the carrier to make further effort to recollect in the event that it does not believe the proper charges resulted from the Government's audit. Attention is further directed to the fact that the railroads would never have, under such a plan, more money than the Government lawfully owed for the reason that the Government is shipping daily and is currently obligated to the railroad companies for transportation charges. This would place the handling of governmental transportation charges on substantially the same basis as applies in connection with commercial transactions.

I am very sure from our previous negotiations with you and others connected with the Government with regard to the same subject that there exists no differences as between us as to the necessity of more prompt payment than has heretofore prevailed. I hope that you and your associates may consider the suggestions contained herein as reasonable and practical and that we may rely upon your good offices to bring about some such arraingement. It may be that you may desire to discuss this matter and perhaps make some suggestions that differ somewhat from the plan proposed herein. Should this situation develop, I want to assure you that either the officers of this Association or the appropriate officers of this Association with a committee of the lines will gladly discuss the subject with you at such time and place as may be mutually satisfactory. I feel sure that we both desire to obtain a very substantial improvement in the situation that now exists, and I am of the opinion that if these matters can be handled along lines somewhat similar to those which we have recommended that it will not only create a much better feeling as between the railroads and the

Government, but in addition thereto will materially reduce the expenditures of both parties in the handling of these accounts and give to the railroads money which is due and greatly needed.

With very kindest regards, I beg to remain.

Yours most cordially.

(Signed) J. J. PELLEY.

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